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S Gopal a/l Subramaniam v Pakiam a/p Raman

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HIGH COURT (JOHOR BAHRU) — DIVORCE PETITION NO 33–57–02 OF 2015
ABDUL MAJID JC
18 JANUARY 2017

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Family Law — Divorce — Petition — Petitioner and respondent sought court's order to dissolve their marriage — Whether petitioner should pay for monthly maintenance — Whether petitioner should redeem all jewellery pawned allegedly for his profit — Whether respondent entitled to 50% share in the earnings between January 2011–December 2014 — Whether respondent entitled to 50% of future earnings

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The petitioner and the respondent were married on 27 May 1978 and they were blessed with five children. In the present action, the petitioner sought from the court, inter alia, to: (a) dissolve their marriage; (b) an order for him to pay RM800 per month for maintenance; and (c) be at liberty to apply for variation. In response, the respondent filed a cross-petition seeking for: (i) a declaration that the marriage was dissolved owing to the petitioner's conduct; (ii) a dissolution of their marriage; (iii) the petitioner to pay her outstanding income tax within 90 days from the date of the court's order; (iv) the profit obtained from their Shaklee's business to be shared equally and 50% of the respondent's share to be paid within 30 days from the date of the court's order; (v) the future profit from Shaklee's business to be shared equally and 50% of the respondent's share to be paid directly to her; (vi) an order against Shaklee to comply with and give effect to 'vi' above; (vii) the petitioner to redeem the pawned jewellery bearing the receipt Nos A00610, A00611, A00612 and A00613 from one Thye Cheong Pawnshop Sdn Bhd within 14 days from the date of the court's order; (viii) damages for mental anguish and emotional distress to be assessed by the court; and (ix) costs of the petition to be borne by the petitioner. The issues for consideration were: (1) whether the petitioner should pay RM800 for the monthly maintenance; (2) whether the petitioner should redeem all the jewellery pawned allegedly for his profit; (3) whether the respondent was entitled to 50% share in the earnings between January 2011–December 2014; and (4) whether the respondent was entitled to 50% of the future earnings.

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Held:

(1) The petitioner did not dispute his liability to pay the income tax arrears amounting to RM70,180.83, but he requested the payment to be made

in instalments and he agreed to pay RM2,000 per month for that purpose ('the said arrangement'). There was no evidence that the Inland Revenue Board ('IRB') was amenable to the said arrangement. If the court allowed such arrangement, this tantamount to forcing IRB to accept the arrangement. The IRB was not a party to the action. The court therefore ordered the petitioner to pay RM70,180.83 within 90 days from the date of the order to the respondent (see para 5).

(2) The respondent admitted that she was no longer involved in Shaklee and that she no longer contributed to the business. With the admission, she was not entitled to any income or profit made after 2010. The fact that they built the business together did not mean that she was entitled to a share in the earnings even after she had stopped contributing to it. Therefore, the court dismissed both the respondent's claim for a 50% share in the earnings between January 2011–December 2014; and the respondent's claim for future earnings (see paras 10–11).

(3) With regards to the gold locket which the respondent pawned for RM4,000, the court satisfied that the RM4,000 was meant for the petitioner and this was not challenged by the petitioner under cross-examination. The court therefore ordered the petitioner to pay RM4,000 to the respondent with interest to be assessed by the deputy registrar (see para 12).

(4) With regard to the petitioner's prayer for him to pay maintenance of RM800 per month to the respondent, there was no evidence from the respondent to dispute the amount. As such, the court granted the prayer sought by the petitioner. In addition, the court ordered the petitioner to pay to the respondent costs of RM10,000 (see paras 13 & 15).

[Bahasa Malaysia summary

Pempetisyen dan responden berkahwin pada 27 Mei 1978 dan mereka dikurniakan dengan lima orang anak. Dalam tindakan ini, pempetisyen memohon daripada mahkamah, antara lain, untuk: (a) membubarkan perkahwinaan mereka; (b) perintah untuknya membayar RM800 sebulan untuk nafkah; dan (c) bebas untuk memohon bagi variasi. Dalam menjawab, responden memfailkan petisyen balas memohon untuk: (i) perisytiharan bahawa perkahwinan dibubarkan akibat tingkah laku pempetisyen; (ii) pembubaran perkahwinan mereka; (iii) pempetisyen membayar cukai pendapatan yang tertunggak dalam masa 90 hari dari tarikh perintah mahkamah; (iv) keuntungan yang diperolehi daripada perniagaan Shaklee dikongsi secara sama rata dan 50% daripada syer responden dibayar dalam masa 30 hari dari tarikh perintah mahkamah; (v) keuntungan masa depan daripada perniagaan Shaklee dikongsi secara sama rata dan 50% daripada syer responden dibayar secara terus kepadanya; (vi) perintah terhadap Shaklee untuk mematuhi dengan kesan pemberian kepada 'vi' di atas; (vii) pempetisyen

untuk menebus barang kemas yang digadai dengan resit No A00610, A00611, A00612 dan A00613 daripada satu Thye Cheong Pawnshop Sdn Bhd dalam masa 14 hari dari tarikh perintah mahkamah; (viii) ganti rugi untuk seksaan jiwa dan tekanan emosi dinilai oleh mahkamah; dan (ix) kos petisyen ditanggung oleh pempetisyen. Isu-isu untuk pertimbangaan adalah: (1) sama ada pempetisyen patut membayar RM800 untuk nafkah bulanan; (2) sama ada pempetisyen patut menebus kesemua barang kemas yang digadai yang didakwa untuk keuntungannya; (3) sama ada responden berhak kepada 50% syer dalam pendapatan di antara Januari 2011–Disember 2014; dan (4) sama ada responden berhak kepada 50% daripada pendapatan masa hadapan.

Diputuskan:

(1) Pempetisyen tidak mempertikaikan lialibiti untuk membayar tunggakan cukai pendapatan yang berjumlah sebanyak RM70,180.83, tetapi dia memohon bayaran tersebut dibuat dalam bayaran ansuran dan bersetuju untuk membayar RM2,000 sebulan bagi tujuan tersebut ('penyusunan tersebut'). Tidak terdapat keterangan bahawa Lembaga Hasil Dalam Negeri ('LHDN') bersetuju dengan penyusunan tersebut. Jika mahkamah membenarkan penyusunan sedemikian, ini merupakan sebagai memaksa LHDN untuk menerima penyusunan tersebut. LHDN bukan pihak kepada tindakan tersebut. Mahkamah oleh itu memerintah pempetisyen untuk membayar RM70,180.83 dalam masa 90 hari dari tarikh perintah kepada responden (lihat perenggan 5).

(2) Responden mengakui bahawa dia bukan lagi terlibat dalam Shaklee dan dia bukan lagi menyumbang kepada perniagaan tersebut. Dengan pengakuan tersebut, dia tidak berhak kepada apa-apa pendapatan atau keuntungan yang dibuat selepas 2010. Fakta bahawa mereka menubuhkan perniagaan tersebut bersama tidak bermaksud bahawa dia berhak kepada syer dalam pendapatan walaupun selepas dia berhenti menyumbang kepadanya. Oleh itu, mahkamah menolak kedua-dua tuntutan responden untuk 50% syer dalam pendapatan di antara Januari 2011–Disember 2014; dan tuntutan responden untuk pendapatan masa hadapan (lihat perenggan 10–11).

(3) Berkaitan kepada rantai emas yang mana digadai oleh responden untuk jumlah RM4,000, mahkamah berpuashati bahawa jumlah RM4,000 tersebut adalah untuk pempetisyen dan ini tidak dicabar oleh pempetisyen semasa pemeriksaan balas. Mahkamah oleh itu memerintah pempetisyen untuk membayar RM4,000 kepada responden dengan faedah dinilai oleh timbalan pendaftar (lihat perenggan 12).

(4) Berkaitan permohonan pempetisyen untuk dirinya membayar nafkah sebanyak RM800 sebulan kepadaa responden, tidak terdapat keterangan daripada resonden untuk mempertikaikan jumlah tersebut. Dengan itu, mahkamah membenarkan permohonan yang dipohon oleh

pempetisyen. Selanjutnya, mahkamah memerintah pempetisyen untuk membayar kepada responden kos sebanyak RM10,000 (lihat perenggan 13 & 15).]

Notes

For cases on divorce petition, see 7(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 4381–4392.

Cases referred to

Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor [1997] 3 MLJ 693, SC (refd)
Sivanes a/l Rajaratnam v Usha Rani a/p Subramaniam [2002] 3 MLJ 273; [2002] 3 CLJ 300, CA (folld)

Legislation referred to

Evidence Act 1950 s 73A, 73A(2)
Law Reform (Marriage and Divorce) Act 1976 s 76
Rules of Court 2012 O 34 r 2(2)

T Gunavati (Albert Ding Lee & Partners) for the appellant.
S Nishanti (Sykt Rodziah) for the respondent.

Abdul Majid JC:

INTRODUCTION

[1] The respondent/wife ('the respondent') appeals against my decision made on 20 November 2016 in respect of prayers 12(d)–(e) of her cross-petition. Both the petitioner/husband ('the petitioner') and the respondent were married on 27 May 1978 in Ipoh, Perak and they were blessed with five children. It was alleged by the respondent that sometime in 2009, the petitioner started having an affair with one Usha Rani and from then onwards the landscape of their marriage has changed and in 2011 the petitioner left the matrimonial home. The petitioner is a registered distributor under Shaklee Products (M) Sdn Bhd ('Shaklee').

THE PETITION

[2] The petitioner seeks from this court, inter alia, to:

(a) dissolve their marriage;

(b) obtain an order for him to pay RM800 per month for maintenance commencing from the date of the decree nisi; and

(c) be at liberty to apply for variation;

[3] The respondent also filed a cross-petition seeking for:

3.1 a declaration that the marriage is dissolved owing to the petitioner's conduct;

3.2 a dissolution of their marriage;

3.3 the petitioner to pay her outstanding income tax within 90 days from the date of the court's order;

3.4 the profit obtained from their Shaklee's business to be shared equally and 50% of the respondent's share to be paid within 30 days from the date of the court's order;

3.5 the future profit from their Shaklee's business to be shared equally and 50% of the respondent's share to be paid directly to her;

3.6 an order against Shaklee to comply with and give effect to para 3.5 above;

3.7 the petitioner to redeem the pawned jewellery bearing the receipt Nos A00610, A00611, A00612 and A00613 from one Thye Cheong Pawnshop Sdn Bhd within 14 days from the date of the court's order;

3.8 damages for mental anguish and emotional distress to be assessed by the court; and

3.9 costs of this petition to be borne by the petitioner.

DECISION

[4] Both the petitioner and the respondent agreed to the dissolution of their marriage. Therefore, the marriage is accordingly dissolved and decree nisi to be made absolute after three months.

[5] The petitioner does not dispute as to his liability to settle the income tax arrears amounting to RM70,180.83 but he requested for the payment to be made in instalments to the respondent. He agreed to pay RM2,000 per month for that purpose. There is no evidence before this court that the Inland Revenue Board ('the IRB') is amenable to this arrangement. What was in evidence was the petitioner would be writing to the IRB to make the proposal. And if I were to allow such payments to the respondent by way of instalments this tantamount to forcing the IRB to accept this arrangement. The IRB is not a party to this action. The petitioner therefore is to pay RM70,180.83 within 90 days from the date of the order to the respondent.

[6] Hence, the court is left to decide whether:

(a) the petitioner should pay RM800 for the monthly maintenance;

A (b) the petitioner should redeem all the jewellery pawned allegedly for his benefit;

(c) the respondent is entitled to 50% share in the earnings between January 2011–December 2014; and

B (d) the respondent is entitled to 50% of the future earnings.

DOCUMENTS

C **[7]** Both parties have filed their separate bundles of documents and they only agreed to:

(a) their marriage certificate;

(b) the marriage tribunal certificate; and

D (c) their five children's birth certificates.

The rest were disputed either over the contents, authenticity or both. In fact, the bundles were prepared not in accordance with O 34 r 2(2) of the Rules of Court 2012. In the course of the trial, however some documents were managed E to be tendered and marked as exhibits while majority remained as ID. The petitioner's bundles of documents are mainly to show his expenses whilst the respondent's bundles of documents show her participation in the events organised by Shaklee.

F **[8]** True, s 73A of the Evidence Act 1950 makes exception for civil proceedings, it still behoves the court to consider and be satisfied that undue delay or expense would otherwise be caused before admitting them. And I do not think that I have defied the Court of Appeal in *Jaafar bin Shaari & Anor (suing as administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693 as these documents were not in the agreed bundle. G As far as the documents marked as ID I have to disregard them as the provision of s 73A(2) was not complied with.

SHARE OF INCOME/EARNINGS

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[9] According to the petitioner he started his distributorship under Shaklee in 1995 all by himself and the respondent did not contribute in the business except that she tagged along as and when the petitioner decided to ask for her company. However, it was not disputed that sometime later the distributorship I was registered under the respondent's name when the petitioner got into some financial trouble. Subsequently in 2004 the same was registered under GP Family Enterprise where both of them were proprietors. In 2010 the registration of the distributorship was reverted to the petitioner alone.

However, under cross-examination he admitted that the respondent did attend some courses and product trainings and that they built the business together to the extent that she obtained the level of a master. But after he left their matrimonial home in 2011 he was entirely on his own.

[10] The respondent admitted that she was no longer involved in Shaklee after 2010. And she also admitted that she no longer contributed to the business. She said:

> Q: Setuju dengan saya selepas tahun 2010, selepas GP Family Enterprise ditukar kepada nama S Gopal, tiada apa-apa bukti yang menyokong, tiada apa-apa bukti untuk menyokong bahawa kamu telah menyumbang kepada perniagaan tersebut. Betul atau tidak?
>
> A: Menyumbang pasal apa?
>
> Q: Perniagaan tersebut, Shaklee. After 2010.
>
> A: 2010 lepas itu memang I dah stop.
>
> ...
>
> Q: So selepas tahun 2010 perniagaan tersebut, perniagaan Shaklee telah dijalankan dan dimajukan sendiri oleh Pempetisyen. Betul atau tidak? Tanpa sumbangan daripada kamu.
>
> A: Saya ... because masa itu dia dah stopkan saya —
>
> Q: No, I just want to know yes or no?
>
> A: Ya, setuju.

With this admission of hers, I have no choice but to hold that she is not entitled to any income or profit made after 2010. The fact that they built the business together does not mean that she is entitled to a share in the earnings even after she had stopped contributing to it. There is no evidence from Shaklee in respect of documents in Bundle C at pp 4–5. And I could not find any evidence referring to the same and they were not tendered in court.

[11] Therefore, I dismiss the respondent's claim for a 50% share in the earnings between January 2011–December 2014. For the same reason I dismiss her claim for future earnings. Even if I'm in error in my reasoning that she is not entitled to a share in the earnings from January 2011–December 2014, I'm guided by the decision of the Court of Appeal in *Sivanes a/l Rajaratnam v Usha Rani a/p Subramaniam* [2002] 3 MLJ 273; [2002] 3 CLJ 300 on s 76 of the Law Reform (Marriage and Divorce) Act 1976 where Abdul Hamid Mohamad JCA (as he then was) held at p 279 (MLJ); pp 305–306 (CLJ):

> From the authorities referred to us by both learned counsel and from my research, as far as I can ascertain, I am unable to find any decided case in Malaysia and

Singapore to support an accounting of all the assets acquired or improved during the marriage and the income thereof and the determination of who had benefitted more or less and awarding a shortfall to the party who is found to have benefitted less. All the cases simply talk about the 'division' of the matrimonial assets, which necessarily means the existing assets at the time of the divorce. Of course the question of the size and nature of each spouse's contribution and who has enjoyed the property to the exclusion of the other (for example, as in this case, where only one party lived at the Crescent Court Apartment) and the reasons why, are relevant in determining the portion that each spouse should get, *but not, in my view, for the purpose of calculating either spouse's share of past income*.

This view, in my opinion, is consistent with the wording and spirit of s 76. That section talks of 'division' of assets acquired during the marriage and provides the factors that should be taken into account when making the division. (Emphasis added.)

PAWNED JEWELLERY

[12] As regards the pawned jewellery, it was put to her that the jewellery were pawned not for the benefit of the petitioner and she agreed that she had these jewellery pawned because the petitioner left her nothing when the latter left their matrimonial home. Under cross-examination she said:

Q: Ok. Kamu katakan Pempetisyen datang rumah ambil surat dia lepas itu dia cakap macam itu tapi dekat sini, surat pajak semua, tahun 2014 adalah under nama kamu sendiri, bukan under nama Pempetisyen. Jadi setuju dengan saya bahawa barang-barang kemas ini telah dipajak untuk kegunaan sendiri bukan untuk kegunaan Pempetisyen?

A: Ini untuk kegunaan sendiri. Pasal apa, dia tak bagi saya satu sen pun. Dia tinggal saya macam itu saja dengan anak saya.

Q: Jadi ini dipajak untuk kegunaan kamu sendiri?

A: Ya.

Q: Betul?

A: Ya.

Q: Jadi jawapan kamu bahawa kamu telah pajak barang kemas tersebut dan juga telah memberikan cash tersebut kepada Petitioner adalah tidak benar.

A: Ya.

Nevertheless, she maintained that the gold locket which she pawned earlier for RM4,000 was for the petitioner. While she was under cross-examination I posed some questions for clarification and she stated as follows:

Pakiam: Ada satu saja, Tuan Arif. Yang ada satu page 9. 'Satu rantai loket emas batu' itu memang I masukkan masa dia perlu duit. So dia kata

dia nak ambil balik lepas dia dapat duit. Dia tak ambilkan. So I bila tak ada duit, pergi dekat kedai pajak, minta tambah. So dia bagi RM2000 pasal saya kesusahan duit masa itu. So itu RM6,200 itu, itu dia yang ... saya bagi untuk dia duit itu. Tapi memang date itu tak sama pasal saya minta tukar, saya minta duit untuk tambah RM2000, dia bagi. So rantai itu perlu bagi dapat RM2000 tambahan, masa itu emas naik.

YA: So you kata date?

Pakiam: Yang date itu dia tukar pasal apa, Tuan Arif, pasal masa saya letakkan untuk dia, saya nak bagi RM4,000. Saya bagi dia RM4000 sebab saya pajak itu rantai mak mentua saya. Saya pajakkan dia untuk kesusahan dia minta. Lepas itu —

YA: Pajak bila?

Pakiam: Itu masa sebelum, I think 2009 agaknya. So saya bagi tolong dia. Lepas itu dia tinggal saya tak ada bagi apa-apa duit, saya kesusahan. So saya minta kedai pajak itu saya nak tambah RM2,000, saya boleh dapat tak, dia kata boleh. So dalam RM2,000 lebih itu baru saya pakai duit itu saya gunakan. Yang RM4,000 lebih itu, dia pajakkan, Tuan Arif. Tapi saya yang masukkan, nama atas saya. Saya pinjam duit untuk dia. Untuk dia buat business.

YA: So all in all, jadi RM6,200?

Pakiam: Ya. Sampai sekarang saya tak boleh ambil rantai itu. Say selalu enam bulan ke atas, saya pergi tukar, anak-anak saya yang tolong untuk bayar duit itu semua.

YA: Pajak pertama, wang diberi kepada En Gopal, Petitioner.

Pakiam: Ya.

YA: Ya.

TGV: Jadi barang-barang kemas ini, semua telah dipajak oleh kamu sendiri. Betul?

Pakiam: Ya.

Learned counsel for the petitioner did not pursue thereafter in respect of this issue. Having heard the evidence, I'm satisfied that the RM4,000 was meant for the petitioner and this was not challenged by the petitioner under cross-examination. I therefore order that the petitioner to pay RM4,000 to the respondent. As there is interest charged to this, the interest is to be assessed by the deputy registrar.

MAINTENANCE

[13] With regard to the petitioner's prayer for him to pay maintenance of RM800 per month to the respondent, I find no evidence from the respondent to dispute the amount. Hence, I grant the prayer sought for by the petitioner.

CONCLUSION

[14] In the circumstances, I allow the petitioner's petition in respect of prayers 14(a), (b) and (c).

[15] As for the respondent's cross-petition, I allow prayers 12(b), (c), (g) in part, (h) to be assessed by the deputy registrar and costs of RM10,000 to be paid by the petitioner to the respondent.

Order accordingly.

Reported by Dzulqarnain Ab Fatar